

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

M & D PROPERTIES, INC., d/b/a
CONTINENTAL WINDOW AND
REMODELING

and

Case No. 25-CA-27515-1

INDIANA REGIONAL COUNCIL OF
CARPENTERS & MILLWRIGHTS,
a/w UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO

Walter Steele, Esq., for the General Counsel.

Michael Klarke, pro se, of LaPorte, Indiana,
for the Respondent.

David Lee, Esq. (Whitfield & Gregorio),
of Indianapolis, Indiana, for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Michigan City, Indiana on August 13-14, 2001. The charge was filed March 22, 2001 and the complaint was issued June 29, 2001. The General Counsel alleges that Respondent, M & D Properties, Inc., d/b/a Continental Window and Remodeling, by Michael Klarke, violated Sections 8(a)(3) and (1) of the Act on March 19, 2001, by telling employee Tim Laster that it had no work for a union man and by discharging Laster. Respondent contends that Laster quit its employment and that it had no work for him on March 19.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, engages in window replacement and home remodeling. It has its office in LaPorte, Indiana, where it annually purchases and receives goods valued in excess of \$50,000 from firms within Indiana, who it turn receive these goods from points outside of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the Indiana Regional Council of Carpenters and Millwrights, is a labor organization within the meaning of Section 2(5) of the Act.

II. Unfair Labor Practice

Michael Klarke operates M & D Properties, although his wife owns the company. Klarke does the hiring and directs the workforce with the assistance of John Conlin, who is Respondent's senior person onsite on a continual basis. In early 1999, Klarke hired Tim Laster as a carpenter at a payrate of \$12 per hour. During 1999 Laster quit his employment with Respondent, went to work for another employer for several months and then was rehired by M & D. During 2000, Laster threatened to quit again and received a raise to \$14 per hour. Klarke considered Laster an excellent employee.

In January or February 2001, Klarke distributed a "subcontractor information sheet" to his employees. Laster wrote "springtime" in a space entitled "termination date" on his sheet. Shortly thereafter, Klarke asked Laster what he meant. Laster told Klarke that he had learned that he had a daughter and that he needed a job with health insurance in order to obtain custody of the child. Laster indicated that unless Klarke could provide him with health insurance, he would obtain another job in the spring.

During February and March, Respondent's primary, if not only, project was the renovation of a church in Michigan City, Indiana. Work on this project was hampered due to an irregular pattern in the availability of funds for the project. Due to interruptions in the funding, several of Respondent's employees did not work every day for a period in early March. For example, on Monday, March 5, 2001 only 4 members of Respondent's 7-8 employee remodeling crew worked. Only three worked on Tuesday, March 6, and two of those employees only worked 4 hours. On Wednesday, March 7, only four employees worked; none of them for a full day.

On Thursday, March 8, four employees worked an 8-hour day and one worked six hours. On Friday, March 9, four employees worked from between 6 to 8 hours. Four employees worked eight hours each on Monday, March 12, including Tim Laster, who had not worked at all for Respondent since Friday, March 2. Four employees, including Laster worked Tuesday, March 13 and Wednesday, March 14. Laster only worked 6 hours on the 14th.

On or about March 11, 2001, Tim Laster contacted the Union to express an interest in joining. He was contacted by a non-construction industry organizer on the 11th and then again by Robert Little, a construction industry organizer, on March 12. On Thursday, March 15, Laster met with Little at the union hall and signed an authorization card.¹ Little asked Laster to determine if other employees of Respondent were interested in joining the Union and if so, if they would meet with Little.

Laster did not work on March 15, and was not scheduled to work on Friday, March 16. An axle had broken on his truck and he was trying to get it fixed. However, on March 16, he went to the Michigan City church jobsite to get his paycheck for the March 8-14 payperiod.² At

¹ On the authorization card, Laster stated he was living in Knox, Indiana, which is approximately 37 miles south of Michigan City and 26 miles south of LaPorte. At hearing there appeared to be an issue as to when Laster moved from LaPorte to Knox. The authorization card establishes to my satisfaction that Laster moved prior to March 15. I do not find this fact to be particularly relevant to the issues in this case, i.e., whether Laster quit or was fired, since Knox is only a 45 to 60 minute drive from Michigan City.

² Respondent's payperiods start on Thursdays and end the following Wednesday. Employees are paid on Fridays, two days after the end of each payperiod.

Klarke's request, Laster worked 4 hours for Respondent on March 16.³ While, at work on March 16, Laster spoke with other employees, including the on-site foreman, John Conlin, about what he considered to be the benefits of joining the Union and encouraged them to attend a meeting at the union hall, which he and Little had tentatively set for March 20.

On the evening of March 16, Laster went to a bank to cash his paycheck. The bank refused to cash it due to insufficient funds. Laster was very angry and called Klarke. He left a message on Klarke's answering machine that he wished Klarke was standing in front of him so that he could knock Klarke on his "f-g butt."

At about 6:00 a.m. on the Monday, March 19, 2001, Laster called Michael Klarke to inquire whether he was working that day. Klarke told Laster that nobody was going to be working. Klarke said nothing to Laster that indicated that he thought Laster had quit or was no longer his employee. Klarke had decided not to have any of his remodeling employees work at the church that day, either because no money was available or because it was raining. Between 7 and 8:00 a.m., Klarke called a number of employees and told them to go to work at the church. Shortly thereafter, Laster called employee Don Young and learned that others had been told to go to work. Laster told Young that he was going to work also. Young called Klarke and told him that Laster was coming to work. I infer that between 6:00 a.m. and the end of his conversation with Young, Klarke learned that Laster had become associated with the Union in some manner and had encouraged other employees to attend a union meeting the next evening.

Michael Klarke immediately called Laster. According to Laster, Klarke told him that, "he had work for the guys but he didn't have work for a union man." For the reasons set forth in the analysis section of this decision, I find this testimony to be credible.⁴

³ I credit Laster's testimony over that of Klarke in finding that Klarke asked Laster to work. Klarke contends that Laster decided to work on his own because he owed Klarke money and did not intend to work for him anymore. I credit Laster's testimony that it wasn't until after March 19, that he told Richard Bartels to apply the 4 hours he worked on March 16, to his debt. At the same time he surrendered his keys to the church jobsite and Respondent's warehouse.

⁴ Klarke testified several times about his conversations with Laster on March 19, 2001.

...on the 19th [of March], he called to see if we had any work. And I said, no, that it was raining. And I said, "Besides, if there was any, I thought you said that you were going to work with the Union."

[Laster replied] "Well, I am. But they don't have anything yet."

And I said, "Well, it's raining. Nobody is working today."

Tr. 37 – 38.

On the 19th, I asked him. I said, "I thought you quit."
And he said, "I did. But they don't have anything for me now. And if you've got some hours for me, I could use them."

Tr. 41.

In an affidavit given to the General Counsel prior to trial, Klarke stated that he told
Continued

Laster never worked for Respondent again and made no attempts to get work from Respondent after March 19. Laster immediately called union organizer Rob Little and told him that he'd been fired. Then Laster went to the church jobsite and told the employees there that Klarke had told him that he didn't have work for a union man. Present on the jobsite on March 19, were 5–6 employees: John Conlin, Todd Pratt, Don Young, "Gene" McAfee, Dennis Euler and possibly Randy Conlin.⁵

Analysis

The General Counsel must show that an employer was substantially motivated by a desire to discriminate against an employee(s) for protected activity to prove that an adverse

Laster:

I've got three or four guys not working today. You don't work for me. You said that you are joining the Union to work 40 hours a week. I don't have work for you. You don't work for me.

Tr. 43.

On March 19th, at 5:45, 6:00 a.m. in the morning, Mr. Laster called. He asked if there was any work. And I said, no, nobody was going to be working that day. And later in the day, approximately 10:00 or 10:30, I called several people that worked for me, and told them to go on into the church and do some work. Because the money had come available, that they had lined up some additional money. And so we could get some things done.

I got a call back from one the men, John Conlin, Don Young, I'm not sure which one. They said that Tim [Laster] had just called him, after I spoke to him, and that he said that he was coming into work.

And I called Mr. Laster back. And he picked up the phone. And he said "I'm on my way."

And I said, "On your way where?"

And he says, "Well, I am going into the job site at the church."

And I said, "I don't—I told you that I don't have work for you today. You know, I don't have that much work for my own people. And you know, you don't work for me anymore. You quit." And I said, "Right now, I don't have any hours that I can give you.

Because I have got—you know, I'm short of hours for my own people right now, and they still work for me."

Tr. 294.

⁵ I conclude that the these employees worked at the church on March 19 from the testimony of Todd Pratt, John Conlin, Tim Laster and Respondent's payroll records, G.C. Exhibit 2(e). I do not find "Gene" McAfee's testimony that he was not at the church on March 19 credible. McAfee was suffering from a serious medical condition when he testified and his recollection of events was confused. He also testified that he saw Laster at the church after he stopped working for Respondent. There is no evidence that Laster visited the church jobsite after March 19 and Exhibit 2(e), which shows that McAfee worked 38 hours for Respondent during the week ending March 21, would suggest that he was at the church on Monday, March 19.

personnel action violates Section 8(a)(3) and (1). To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may
 5 be drawn from circumstantial evidence as well from direct evidence.⁶ Once the General Counsel had made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981).

10 In the instant case, Respondent admits that Tim Laster engaged in union activity and that it was aware that he had affiliated with the Union. The credited testimony of Tim Laster that Mike Klarke told him not to come to work on March 19, because he had no work for a union man establishes that Laster was terminated for his union activities and establishes a Section 8(a)(3)
 15 and (1) violation.⁷

The essence of this case is the reasons for which I find Laster's account of his March 19 conversations with Klarke to be credible. The most important factor in my decision to credit
 20 Laster is that I find Respondent's rationale for refusing to employ Laster on March 19, to be pretextual.

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive...In appropriate circumstances, the trier of fact can reasonably infer from the
 25 falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."...Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially
 30 since the employer is in the best position to put forth the actual reason for its decision...

Reeves v. Sanderson Plumbing Products, Inc., _U.S._, 120 S. Ct. 2097 at 2108 (June 12, 2000). Also see, *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897, 898 (1998).

35 The starting point for evaluating the credibility of Respondent's explanation for its conduct is Michael Klarke's admission that Tim Laster never told him that he was quitting. Instead, he testified that on the weekend of March 10-11, employee Richard Bartels told him that Laster had stopped by his house, given Bartels keys to the church and Respondent's
 40 warehouse and told Bartels to tell Klarke "that he [Laster] was done." This scenario is very improbable in view of the fact that Laster worked for Respondent on March 12, 13 and 14.

Klarke testified further that the reason Laster worked for him from March 12-14, is that on March 12, Laster called him and asked to be allowed to work for Respondent because "they
 45 [the Union] didn't have anything for him yet." This is similarly improbable since Laster did not sign a union authorization card until March 15.

⁶ *Flowers Baking Company, Inc.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

⁷ The timing of Laster's lay-off also strongly suggests discriminatory motive.

I also credit Laster's testimony over that of Klarke and Bartels in finding that Laster never told either of them that he was quitting, nor did he ever mention joining the Union to either of them.⁸ I also credit Laster's testimony over that of Bartels and find that Laster gave Bartels the keys to the church jobsite and Respondent's warehouse after March 19. Bartels testified that he was certain that Laster dropped off the keys on March 8, because he and son went out to celebrate their birthdays together immediately afterwards. Even assuming that the celebration was the same day that Laster gave Bartels the keys, it is improbable that this celebration occurred on March 8, in view of the fact that Bartels' son's birthday is March 13, and Bartels' birthday is in May. Bartels also testified that on March 8, Laster told him to tell Klarke that Laster was quitting and that Laster was joining the Union. This is also improbable in view of the fact that Laster didn't talk to Union Organizer Little until March 12 and didn't meet with Little and sign an authorization card until March 15.⁹

The testimony of other of Respondent's witnesses also supports a finding that Klarke's testimony is pretextual. On-site supervisor John Conlin testified he is normally one of the first people to be informed when an employee quits. Conlin knew nothing about Laster quitting prior to March 19.

Finally, the record belies Klarke's assertion that he knew of Laster's union affiliation when he employed him from March 12-14, and had work for him, but did not have work for him on March 19, after Laster had openly engaged in union activity. The size of the crew called to the church jobsite on March 19, and Respondent's payroll records for the week on March 15 - 22, establish that there was as much work for Laster to do on March 19, as there had been the week before.¹⁰ Among those working on March 19, were Dennis Euler and Todd Pratt, who

⁸ There are aspects of Laster's testimony that support Respondent's version of events, however, I find they are outweighed by evidence to the contrary. Normally, for example, an employee who wishes to continue working for an employer does not tell the employer he would like to knock him on his "f-g butt." Moreover, the following testimony by Laster regarding his conversation with Klarke on the evening of March 16, could be construed as consistent with an intention to quit working for Respondent::

And I told him that I was really upset, that it came down to crunch time, and I trusted him and went ahead and worked for him, and then when it come time for me to go, he piled all of this on me, to where I had to borrow money to be able to get my axle, and was almost late picking up my girlfriend.

Tr. 156.

On the other hand, this testimony may simply stand for the proposition that Laster worked on March 16, as a favor to Klarke and then was greatly inconvenienced when it was time for him to leave work that day, by having to run around getting money so that he could have his axle fixed. Had he not worked on the 16th, Laster would have had much more time to straighten out the problem with his check, or obtain money from other sources.

⁹ As the General Counsel points out in his brief, Bartels never testified that he told Klarke that Laster had quit. Bartels testified that he told Laster that it was his responsibility to tell Klarke if he was quitting.

¹⁰ The record indicates that Respondent laid-off employees after March 19. However, this is irrelevant to whether Respondent acted discriminatorily in not employing Laster on March 19. Moreover, it is not clear that Laster would have been one of the employees laid off subsequently.

were not called to work the week before on days on which Laster worked. There is no explanation for why there was work for Laster the week prior to March 19, but not for Euler and Pratt, and no work for Laster on March 19, while there was work for these two employees.

5 Conclusions of Law

By discharging Tim Laster on March 19, 2001, and telling him that it had no work for a union man, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

10 Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Tim Laster, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

25 ORDER

The Respondent, M & D Properties, Inc., LaPorte, Indiana, its officers, agents, successors, and assigns, shall

30 1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting the Indiana Regional Council of Carpenters and Millwrights, or any other union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

40 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tim Laster full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Tim Laster whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

5 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Tim Laster in writing that this has been done and that the discharge will not be used against him in any way.

10 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

15 (e) Within 14 days after service by the Region, post at its LaPorte, Indiana office, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are
20 customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent
25 at any time since March 19, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

30 Dated, Washington, D.C. September 27, 2001.

35 Arthur J. Amchan
Administrative Law Judge

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¹² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Indiana Regional Council of Carpenters & Millwrights, a/w the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tim Laster full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tim Laster whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tim Laster, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

M & D PROPERTIES, INC. d/b/a
CONTINENTAL WINDOW AND REMODELING

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 575 North Pennsylvania St., Room 238, Indianapolis, Indiana 46204-1577, Telephone 317-226-7413.